Wong Sing Nang v Tiong Thai King

HIGH COURT (SIBU) — ELECTION PETITION NO 20-26-1 OF 1995
CHARLES HO J
20 JANUARY 1996

Election *— Offences — Allegation of bribery and corrupt practice — Donation made to school fund — Whether donation was personal — Whether donation amounted to bribery — Whether such act is to be regarded as done for corrupt purpose — Election Offences Act 1954 ss 10(a), 32(a) & (c)*

Evidence *— Burden of proof — Election offences — Bribery and corrupt practice — Quasi criminal — Whether burden of proof beyond reasonable doubt*

The petitioner was the unsuccessful candidate at the general election held on 25 April 1995 for the Parliament constituency of Lanang while the respondent was the winning candidate. The petitioner, by this petition, sought to avoid the election of the respondent on the grounds that the respondent in the course of his election campaign committed bribery under ss 10(a) and 32(a) of the Election Offences Act 1954 ('the Act') and corrupt practice under s 32(c) of the Act. The petitioner rested his case on an event which had taken place a few days before the polling date whereby a donation of RM200,000 was made by the respondent to a school fund. The petitioner alleged that the donation was a personal donation of the respondent and that it was made corruptly in order to induce the electors or voters in the Lanang constituency to vote for him. The respondent denied such allegation and in his affidavit stated that the donation was given as an advance on behalf of his company, the Rimbunan Hijau Group of Companies ('the group'), of which he is an active director, and that such donation made by the company was no different from other donations made by the group for the purposes of promoting Chinese education and culture in Sibu.

Held, dismissing the petition:

(1) If an act forbidden by statute were done, the court is allowed to draw from it the ordinary inference prima facie that it was done for a corrupt purpose. However, before such inference can be drawn there must be clear and unequivocal evidence before the court to prove the allegation. Further, the court has to bear in mind that because an allegation of corrupt practice is of a quasi criminal nature in as much as a finding of corrupt practice entails penal consequences, such allegation must be proved by the petitioner beyond reasonable doubt (see pp 265I, 266F–G ; *Re Pengkalan Kota Bye-Election* [1981] 1 MLJ 265 followed).

(2) Based on the evidence, the court was satisfied that the donation was made on behalf of Pemandangan Jauh Sdn Bhd, which is a subsidiary of the group. This would mean that the petitioner has

failed to prove beyond reasonable doubt that it was a personal donation which was the basis of the petition (see p 269F–H). A

(3) There was no direct evidence that the voters in the constituency were in any way influenced by the donation in question. There was no reason why the voters should not treat the donation just like any other donations by other individuals or organizations. In the circumstances, the conclusion that the donation must have to some extent influenced the voters when they cast their votes could not be readily drawn. If the voters were not minded to vote for the respondent, the donation would not have made any significant difference (see p 269H–I). B C

(4) Therefore, the petitioner had failed to prove beyond reasonable doubt that the offence of bribery or corrupt practice and the offence of general bribery as alleged had been committed by the respondent to this petition (see p 270E–F).

[Bahasa Malaysia summary D

Pempetisyen adalah calon yang tidak berjaya dalam pilihanraya umum pada 25 April 1995 untuk kawasan pilihanraya Lanang sementara penentang adalah calon yang telah menang. Pempetisyen, melalui petisyen ini, cuba membabalkan pemilihan penentang atas alasan bahawa penentang semasa mengendalikan kempen pilihanrayanya telah melakukan penyogokan di bawah ss 10(a) dan 32(a) Akta Kesalahan Pilihanraya 1954 ('Akta itu') dan amalan-amalan rasuah di bawah s 32(c) Akta itu. Pempetisyen mendasarkan kesnya atas satu peristiwa yang telah berlaku beberapa hari sebelum hari mengundi di mana satu derma RM200,000 telah dibuat oleh penentang kepada satu tabung sekolah. Pempetisyen mengatakan bahawa derma itu adalah satu derma peribadi oleh penentang and bahawa ianya dibuat secara rasuah dengan tujuan memujuk pemilih atau pengundi dalam kawasan pilihanraya Lanang mengundinya. Penentang menafikan pengataan sedemikian dan di dalam afidavitnya menyatakan bahawa derma itu telah diberikan sebagai satu pendahuluan bagi pihak syarikatnya, Kumpulan Syarikat Rimbunan Hijau ('kumpulan itu'), yang mana beliau adalah seorang pengarah yang aktif, dan bahawa pendermaan sedemikian yang dibuat oleh kumpulan itu tidak berbeza daripada lain-lain pendermaan oleh kumpulan itu bagi tujuan menggalakkan pendidikan dan budaya Cina di Sibu. E F G H

Diputuskan, menolak petisyen itu:

(1) Jika satu tindakan yang dilarang oleh statut dilakukan, mahkamah dibenarkan mengambil darinya inferens biasa prima facie bahawa ianya dibuat untuk satu tujuan rasuah. Namun demikian, sebelum inferens sedemikian boleh diambil mestilah terdapat keterangan yang jelas dan tidak taksa di depan mahkamah untuk membuktikan pengataan itu. Lagipun, mahkamah mesti mengambil ingat bahawa oleh kerana satu pengataan amalan rasuah adalah bersifat kuasi jenayah seperti juga satu dapatan I

amalan jenayah akan mendatangkan kesan penal, pengataan sedemikian mestilah dibuktikan oleh pempetisyen melampaui keraguan yang munasabah (lihat ms 265I, 266F–G; *Re Pengkalan Kota Bye-Election* [1981] 1 MLJ 265 diikut).

(2) Berdasarkan keterangan, mahkamah berpuas hati bahawa derma itu telah dibuat bagi pihak Pemandangan Jauh Sdn Bhd, satu anak syarikat kumpulan itu. Ini bermakna bahawa pempetisyen telah gagal membuktikan melampaui kerayuan yang munasabah bahawa ianya adalah satu derma peribadi yang menjadi asas petisyen ini (lihat ms 269F–H).

(3) Tidak terdapat keterangan langsung bahawa pengundi-pengundi dalam kawasan pilihanraya itu telah dalam apa cara pun dipengaruhi oleh derma yang dipersoalkan. Tidak ada sebab mengapa pengundi-pengundi tidak patut mensifatkan derma itu cuma seperti mana-mana derma yang lain oleh induvidu-individu atau pertubuhan lain. Dalam keadaan itu, kesimpulan bahawa derma itu mesti sampai suatu takat tertentu telah mempengaruhi pengundi apabila mereka membuang undi mereka tidak boleh dibuat. Jika pengundi tidak berniat mengundi penentang, derma itu tidak akan membuat sebarang perbezaan yang penting (lihat ms 269H–I).

(4) Oleh itu, pempetisyen telah gagal membuktikan melampaui keraguan yang munasabah bahawa kesalahan penyogokan atau amalan rasuah dan kesalahan penyogokan am seperti yang dikatakan telah dilakukan oleh penentang kepada petisyen ini (lihat ms 270E–F).]

Notes

For cases on offences in election cases, see 6 *Mallal's Digest* (4th Ed) paras 1086–1088.

For cases on burden of proof in corruption cases, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 220–221.

Cases referred to

Bakshish Singh Sibia v Skukhder Singh Dhindsa 67 ELR
Borough of Plymonth (1929) 7 O'M & H 101
Ghasi Tam v Dal Sing AIR 1968 SC 1191
Harjit Singh v S Umlos Singh AIR 1980 SC 701
Limmerick (1869) 1 O'M & H 260
Pengkalan Kota Bye-Election, Re [1981] 1 MLJ 265

Legislation referred to

Election Offences Act 1954 ss 10(a), 32(a), 32(c), 36, 37
Corrupt Practices Act 1854 s 2 [UK]

Karpal Singh (*Orlando Chua Siau Wei*) for the petitioner.
Cyrus Das (*William Lau Kung Hui & Associates*) for the respondent.

Cur Adv Vult A

Charles Ho J: The petitioner in this petition was the unsuccessful candidate at the last general election held on 25 April 1995, for the Parliamentary constituency of P 183, Lanang. The petitioner had won the same seat in the 1990 general election. Although this time around the petitioner secured 15,813 votes, some 408 votes more than what he had secured in the 1990 B general election, it was not good enough to stop the respondent from emerging as the winning candidate with a majority of 2,408 votes. The petitioner now seeks by this petition to avoid the election of the respondent, Tiong Thai King, who was returned as duly elected on the grounds that the respondent in the course of his election campaign committed bribery as C defined under ss 10(a) and 32(a) of the Election Offences Act 1954 ('the Act'), and corrupt practice under s 32(c) of the Act.

It is clear from the petition and the further and better particulars furnished pursuant to a consent order that the petitioner rests his case entirely on an event which had taken place a few days before the polling date which, for the Lanang constituency, was on 25 April 1995, and the D subsequent publicity given to it by three local Chinese newspapers. The event was in connection with a donation to a school fund. It is not in dispute that on the day in question, ie 23 April 1995, the respondent handed over a cheque for RM200,000 in favour of the United Association of Private Chinese Secondary School Boards of Management, Sibu ('the E SCSB') to its chairman, one Mr Lau Siew Nyuong, at the respondent's party headquarters. The cheque used for the donation was the respondent's personal cheque bearing HKSBC No 826402 and the event was witnessed by the Board members of the SCSB and was covered by the local press. It is alleged by the petitioner that the donation was a personal donation of the respondent and that it was made corruptly in order to induce the F electors or voters in the Lanang constituency to vote for the respondent. In his answering affidavit, the respondent denies that the donation was a personal donation and that it was made with the intention of inducing the voters in the Lanang constituency to vote for him. The respondent says that the donation was given as an advance on behalf of his company, the G Rimbunan Hijau Group of Companies ('Rimbunan Hijau Group'), of which he is an active director and that the donation of RM200,000 was no different from the other donations made by the Rimbunan Hijau Group for the purposes of promoting Chinese education and culture in Sibu.

Before I proceed to consider the evidence both oral and documentary adduced by the petitioner to establish the charges of bribery and corrupt H practice and by the respondent in rebuttal, I will briefly deal with the submissions of senior counsel on both sides touching on the general principles of election petitions and the offence of corrupt practice.

Counsel for the respondent, Mr Das submitted, inter alia, that an essential element of an offence under s 10(a) is the involvement of electors I or voters with a view to inducing them to vote or refrain from voting and s 32(a) only applies where the bribery, treating or intimidation is on a mass scale or alternatively, particular instances of this type of conduct was so

repeated that it may be regarded as general. In support, Mr Das quoted *Re Pengkalan Kota Bye-Election* [1981] 1 MLJ 265 at p 267 where Abdoolcader J (as he then was) said:

> Adverting briefly to the requisite elements of ss 10(a) and 32(c) of the Act for the purposes of these proceedings, in a corrupt practice such as bribery which is alleged in this case the corrupt intention and corrupt inducement to the electors or voters to vote or refrain from voting must exist. The corrupt practice of bribery which is a criminal offence by statute must be strictly proved beyond all reasonable doubt by clear and unequivocal evidence, and the inducement to vote or refrain from voting must be exercised upon one or more electors or voters who must be identified as the objects to whom it was made or addressed.

It is also submitted by Mr Das that the burden of proof for an allegation of corrupt practice is on the petitioner who must prove that the giving of money or of a benefit constituting the bribery was 'a bargain with the voters'. It would appear to be a widely accepted view, as can be seen from the authorities both local and from other jurisdictions (Indian and English) which Mr Das has cited, that the element of bargaining must exist to make the donation of money, gifts and other benefits a corrupt practice (see *Ghasi Ram v Dal Sing* AIR 1968 SC 1191; *Harjit Singh v S Umrao Singh* AIR 1980 SC 701; *Bakshish Singh Sibia v Skukhder Singh Dhindsa* 67 ELR). In the case of *Re Pengkalan Kota Bye-Election*, his Lordship seemed to be of the opinion that in order to establish an allegation of corrupt practice there must be evidence of at least one or more voters having been influenced to vote or refrain from voting the candidate concerned as a result of the inducement. A similar view was expressed in the *Borough of Plymouth*'s case (1929) 7 OM & H 101, where promises of money, food and entertainment were made to a boys' home by an agent of the candidate if the candidate were elected, apparently with the hope of influencing the parents to vote for the candidate. In deciding whether the allegation of corrupt practice was proved in that case, Swift J observed:

> There is no evidence before us that any single individual voter was induced to vote for Mr Moses (the candidate) by the promises of Mr Ballard (the agent). Indeed, the only evidence about a vote which was given, which has been produced before us, was that of a small boy who said: 'I voted for Benn.' I do not therefore think that it is possible to hold that it has been proved that Mr Ballard's promises, improper as I think them to have been did in fact influence the constituency so as to prevent it being a free election. I think it quite likely that Mr Ballard wished they might do so.

Counsel for the petitioner, Mr Karpal Singh did not deal with the question of 'bargain with the voters' which according to Mr Das is an essential element in order to make the donation of money, gifts, etc a corrupt practice under s 10(a). The court was unable to seek Mr Karpal's view on this point as he was not in court when Mr Das made his address and he later gave a written submission.

It is quite clear from the authorities cited that because an allegation of corrupt practice is of a quasi criminal nature in as much as a finding of corrupt practice entails penal consequences, such allegation must be proved

by the petitioner beyond reasonable doubt. Counsel for the petitioner has, therefore, rightly conceded that in the present case the onus is on the petitioner to prove the allegations beyond reasonable doubt.

The submission of counsel for the petitioner is, in effect, that an election petition is not a matter in which the only persons interested are candidates who strove against each other at the election. An election being an essential part of the democratic process, the citizens at large have an interest in seeing, and they are justified in insisting, that all elections are fair and free and not vitiated by corrupt or illegal practices. In this, counsel says, the court is duty bound to insist on the purity of an election and towards this end, the court ought not to be influenced by considerations of expediency in the form of the need to eliminate numerous botherations, tremendous expenses as well as loss of public 'time and money'. As regards the interpretation to be given to s 10(a) counsel urged the court to adopt the interpretation given by the English Court to s 2 of the Corrupt Practices Act 1854 (which is in pari materia to our s 10(a)) in *Limmerick*'s case (1869) 1 O'M OH 260, where at p 261 of the judgment it was stated:

> I am satisfied that where in the second part of the second section of the Corrupt Practices Act 1854 reference is made to offers and promises made before the vote is given, the legislature clearly intended the court to draw a *prima facie* reasonable inference from the act done as to the purpose for which it was done, leaving to the other side to rebut that inference if they could. Every forbidden act done for the purpose mentioned in the Act is to be regarded as done for a corrupt purpose, and once shown that a forbidden act is done for any of the purposes mentioned in the Act immediately becomes a corrupt act, though it would otherwise have been a purely innocent one, that is to say, in some cases the act itself affords ground for reasonable inference of the intention with which the act is done and there the legislature has not introduced the word 'corrupt', and if the act is simply proved to be done, the court is allowed to draw from it the ordinary inference *prima facie* that it was done for a corrupt purpose.

I have no hesitation in agreeing with counsel for the petitioner that if an act forbidden by statute were done, the court is allowed to draw from it the ordinary inference prima facie that it was done for a corrupt purpose. However, I am of the view that before such inference can be drawn there must be clear and unequivocal evidence before the court to prove the allegation, bearing in mind that the burden of proving beyond reasonable doubt is on the petitioner.

Based on the pleading as set out in the petition, the petitioner in this case has to prove beyond reasonable doubt that: (a) the donation was a personal donation of the respondent; and (b) it was given with the illegitimate motive of influencing or inducing the voters in the Lanang constituency to vote for the respondent in the election.

I now come to the facts. Before dealing with the disputed facts and the evidence of witnesses I propose to state briefly the facts which are not in dispute or have not been seriously challenged. The SCSB, Third Division, is an organization formed with the objects, inter alia, of promoting Chinese education in the Third Division. It has as its members, the boards of management of the six private Chinese secondary schools in the Third

Division and not individuals. Sometime in 1994, it set up a special committee with Datuk Hii Yu Chuan as chairman to raise a sum of RM10m for the education fund of the six Chinese schools. Letters of appeals for donations to the fund were sent out to companies, organizations and individuals including the petitioner who confirmed this in court but who said that he did not make any donation because of the impending election. Only three out of the six Chinese schools are in the Parliamentary constituency of Lanang. The SCSB is not a political organization and its chairman, Mr Lau Swee Nguong ('DW4'), is not a member of any political party.

The first question of fact for determination is whether the donation in question to the education fund set up by the SCSB was a personal donation. The respondent called a few witnesses to corroborate his claim that the donation was made by the Rimbunan Hijau Group. I shall revert to their evidence later. The petitioner relies on the giving of a personal cheque of the respondent, what DW4 was reported to have informed the press during the short press conference, the evidence of one Wee Eng Ming ('PW4') who said that during the press conference the respondent sat next to Ting Leng Ing ('PW5') and the fact that at all material times there was no retraction of the reports in the newspapers as evidence to establish the charges. I will first deal with the reports in the three Chinese newspapers. It is to be noted that according to DW4 there were apart from the reporters from the three newspapers other reporters present at the press conference. These other reporters were not called as witnesses and there is no evidence whether they reported the event in their newspapers. There is no doubt that the three reporters had no difficulty in understanding what DW4 said as all of them have a very good command of Mandarin. All the three newspapers reported to the effect that DW4 told the press conference that the respondent personally donated a sum of RM200,000 to the education fund and he hoped others would follow his example and make donations to the fund. There were, however, discrepancies in the reports in that: (i) the report published in the *Miri Daily News* was brief and carried no photograph of the handing over ceremony and it did not mention anything about the target sum of RM10m to be raised; (ii) the report in the *Malaysia Daily News* was the fullest compared to the other two news reports and it said that DW4 told the press conference that RM10m was to be raised for the education fund and up to that date RM7m was received and it was still RM3m short of the target; and (iii) the *Sea Hua Daily News* mentioned RM10m as being the target but did not mention how much was received by the education fund on that date. There are also discrepancies in the oral testimonies of the three reporters who were present at the press conference and who prepared the published reports: (i) PW5 told the court that DW4 did not mention anything about the RM10m to be raised and that RM7m had already been received or anything to that effect but PW3 (Kong) and PW4 seemed to disagree; (ii) they gave different descriptions of the size of the room where the press conference was held; and (iii) PW3 and PW5 did not see where the respondent was or whether he was still in the room at that time but PW4

claimed that during the press conference the respondent was sitting right next to DW4. I pause here to observe that since during the press conference the reporters and DW4 were all seated around the same table it is most unlikely that, if in fact the respondent sat next to DW4, PW3 and PW5 did not see him. It seems to me, therefore, that the reporters did not report what DW4 said verbatim and that it is not unlikely that they inserted something in the reports based on their own knowledge.

In his evidence, DW4 denied that he told the reporters present that the donation was made by the respondent personally. He said he merely showed them the cheque for the RM200,000 and he told the reporters that the donation was from respondent's company.

It is contended by counsel for the respondent that the three reporters are independent and disinterested witnesses and there is no reason to doubt the truth of their evidence. With respect, I do not think the three reporters can be said to be completely disinterested parties, as the accuracy of their reports was being challenged and they must have felt the need to defend the reports made. They claimed they had taken down notes but none of them produced those notes. I have no hesitation in agreeing with counsel that the normal way of proving what a speaker in a public meeting said is to call as a witness an entirely independent newspaper reporter who was present and who took down verbatim what the speaker was saying, his independent evidence would then be extremely important corroborative evidence of other persons at the meeting. The position here, however, is not the same. The other reporters and other independent persons who were present at the press conference would, in my opinion, make better witnesses in this matter. In the face of the discrepancies in both the published news reports and the evidence of the three reporters in court, I do not think too much reliance can be put on such evidence to establish what actually took place and what was said at the press conference.

According to the respondent, the donation was by the Rimbunan Hijau Group. He used his personal cheque as he was unable to get hold of the company cheque and DW4 was pressing him to hand over the donation pledged by him on behalf of his company. The respondent said that this was not the first time that he and other principal directors had made donations on behalf of their companies and asked for reimbursements later. He told the court that the Rimbunan Hijau Group has always been active in promoting Chinese education and culture by giving financial assistance to Chinese schools and so on. For instance, the group rescued an ailing school by donating three acres of land to the school to build classrooms and other facilities. The group also rescued an ailing Chinese newspaper. He also told the court that he obtained reimbursement in respect of the RM200,000 donation.

The chief accountant of the Rimbunan Hijau Group, Mdm Ting Wei Huong ('DW3'), was called to corroborate the testimony of the respondent. According to her, Datuk Ting Hiew King and the respondent are the principal directors of the Rimbunan Hijau Group and that it is the policy of the group that directors do make personal advances under special

A circumstances where there are not enough cheque signatories or fund available or if the process of making a cheque will take some time as directors are spread out, or it is after office hours. She produced an extract (exh D28) from the ledger books of the various companies in the group showing donations made by the respondent on behalf of the companies and reimbursements to the respondent. She also produced exh D9, also B prepared by her, showing donations made by the group to the SCSB from 1986 to June 1995 — totalling RM581,790. From exh D9, the donation of RM200,000 was by far the biggest donation made. If we take into consideration the evidence of DW4, who testified that even though RM200,000 was pledged he was not satisfied and he in fact wanted to C make use of the occasion to get the Rimbunan Hijau Group to donate RM1m, and the amount to be raised for the education fund was RM10m, there was nothing surprising about the donation of RM200,000. It is significant to note that the reimbursement for the RM200,000 was requested for by the respondent and obtained by him before the present petition was filed. There was no evidence that he knew about the present petition and D the grounds to be used before hand. According to DW3, when the respondent requested for the reimbursement she had to ask for the receipt issued by the SCSB wrongly in the name of the respondent to be replaced by a receipt to be issued in the name of Pemandangan Jauh Sdn Bhd, a subsidiary of the Rimbunan Hijau Group. She said that she was the one E who always decided which donation should go to which company's account and it was quite normal for her to request for a receipt to be replaced and to be issued in the name of the company she decided should make the donation. This part of her evidence was corroborated by PW10 who told the court there were occasions apart from the present one when she entertained requests for replacements of receipts. In the instant case, there F was no attempt to hide or to destroy the original receipt. I do not think we can make much out of the replacement of the original receipt. On the evidence of DW3, which was hardly challenged by the respondent, I am satisfied that the donation of RM200,000 was in all probability made by the respondent on behalf of Permandangan Jauh Sdn Bhd.

G My finding as to the donation complained of would mean that the petitioner has failed to prove beyond reasonable doubt that it was a personal donation which was the basis of the petition before me and would accordingly effectively dispose of this matter. I think, however, I should also deal with briefly another submission of counsel for the petitioner that as far as the voters or electors who had read the three published articles H and the photographs appearing therein were concerned it was a personal donation made by the respondent and the same ought to be presumed to be operative in their minds when they were casting their votes. There is no direct evidence that the voters in that constituency were in any way influenced by the donation in question. As there was little doubt that the I voters knew that the education fund was for all the six Chinese schools and a lot of people had by then donated to the fund and considering the fact that the donation was made outright without any solicitation for votes and without any promise of further donation if the respondent were elected,

there was no reason why the voters should not treat the donation just like any other donations by other individuals or organizations. In the circumstances, I do not think we can readily draw the conclusion that the donation must have to some extent influenced the voters when they cast their votes. If the voters were not minded to vote for the respondent, I do not think the donation would have made any significant difference. In any event there is no clear evidence to show that the respondent was in any way responsible for the publication in the newspapers. DW4 who appears to me to be a shrewd old man readily told the court that he was responsible for the publicity given to the donation and the handing over ceremony because, he said, he hoped that such publicity would encourage others to come forward to make donations. Although the evidence and the circumstances surrounding the handing over of the donation would seem to suggest that the respondent might not be as innocent as he tried to make himself out to be and even though the respondent's failure to make any retraction or correction of the impression given by the newspaper articles has raised strong suspicion that he wanted to take advantage of the situation as it no doubt would make him a more popular figure, these however are not sufficient to my mind to establish the allegation of corrupt practice in law especially when there was nothing illegitimate in making a donation to the fund in question.

For the reasons given above, I am not satisfied that the petitioner has proved beyond reasonable doubt that the offence of bribery or corrupt practice and the offence of general bribery as alleged have been committed by the respondent to this petition. Accordingly, I would dismiss the petition with cost. I shall certify accordingly to the election commission under the provisions of s 36 of the Act and to report to the commission under s 37 of the Act that no corrupt practice or bribery has been proved to have been committed by the respondent or by his agent with his knowledge.

Petition dismissed.

Reported by Mariette Peters-Goh